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EX PARTE: IN THE MATTER OF THE PETITION OF THE WILDER'S STEAMSHIP COMPANY FOR WRIT OF MANDAMUS

IN

THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, THE HONORABLE WILLIAM B. GILBERT, ERSKINE M. ROSS, WILLIAM W. MORROW, JUDGES THEREOF, RESPONDENTS.

ARGUMENT IN SUPPORT OF PETITION.

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STATEMENT OF THE CASE.

This matter arises from the peculiar situation of litigants who were in the courts of admiralty jurisdiction in the Republic of Hawaii at the time of the transfer of the jurisdiction of said courts to the courts established by the Act of Congress approved April 30, 1900, organizing the Territory of Hawaii. The only question presented here is as to whether the right of appeal exists in such cases from the Supreme

Court of the Territory to the United States Circuit Court of Appeals for the Ninth Circuit.

The petitioner herein was, as shown by the petition, respondent in an admiralty cause which was pending in the Supreme Court of the Republic at the time when the Act of April 30, 1900, became effective. Under section 10 of that Act the Supreme Court of the Territory took jurisdiction and rendered a decree against the respondent. An appeal to the United States Circuit Court of Appeals for the Ninth Circuit was denied, both by the Supreme Court of the Territory and by the Circuit Court of Appeals. The purpose of the petition is to compel the latter court to take jurisdiction.

I.

ADMIRALTY CASES A CLASS BY THEMSELVES.

In approaching this question it is necessary, in order that we may thoroughly understand the proposition under discussion, that we fix in our minds the principal fact upon which our contention to jurisdiction is founded.

It is, that this is a case in admiralty, and as such is *not* comprehended within the terms of the act of 1900, regarding appeals from the Supreme Court of the Territory, and *is* comprehended within the terms of the fifteenth section of the Act of March 3rd, 1891, establishing the Circuit Court of Appeals, whereby jurisdiction is conferred upon said Court.

Under the Constitution of the United States admiralty cases are a class distinct and separate from all others. The Constitution extends the judicial power of the Federal Courts to three distinct classes of cases, one of which is "cases in law and equity", and another of which is "all cases of admiralty and maritime jurisdiction" (Art. III, § 2). As said by Chief Justice Marshall:

"The grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The dis-

crimination made between them in the Constitution is, we think, conclusive against their identity."

American and Ocean Ins. Co.'s vs. 356 Bales of Cotton, 1 Peters, 545.

II.

THE STATUTES.

The statutes applicable to the matter herein presented are, so far as seem to be necessary to its decision, set out in the petition. Briefly they provide as follows:

Sections 6 and 15 of the Circuit Court of Appeals Act confer upon that Court jurisdiction to entertain an appeal in admiralty cases from the decrees of the Supreme Courts of the several Territories.

Section 1891 of the Revised Statutes provided that—

"The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories and in every Territory hereinafter organized."

This provision was repeated in the Act organizing the Territory as follows:

"SEC. 5. That the Constitution, and, except as herein otherwise provided, all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States: Provided," etc.

Section 10 of said Act provides as follows:

"SEC. 10. That all rights of action, suits at law and in equity, prosecutions, and judgments existing prior to the taking effect of this Act shall continue to be as effectual as if this Act had not been passed. * * * All criminal and penal proceedings then pending in the courts of the Republic of Hawaii shall be prosecuted to final judgment and execution in the name of the Territory of Hawaii; all

such proceedings, all actions at law, suits in equity, and other proceedings then pending in the courts of the Republic of Hawaii shall be carried on to final judgment and execution in the corresponding courts of the Territory of Hawaii; and all process issued and sentences imposed before this Act takes effect shall be as valid as if issued or imposed in the name of the Territory of Hawaii * * *"

Section 86 of said act provides as follows:

"SEC. 86. * * * The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

There was, then, at the time of the organization of the Territory of Hawaii, an existing law (Act of 1891) conferring the jurisdiction here contended for, *i. e.*, appeals from the Supreme Courts of organized Territories to the Circuit Courts of Appeals. There was at the same time an existing law (section 1891, Revised Statutes) extending the laws of the United States to "every Territory hereafter organized". And at the birth of the present territorial government it was provided (section 5) that the existing laws of the United States should "have the same force and effect within the said Territory as elsewhere in the United States", unless it be locally inapplicable or in said Act "otherwise provided". It is upon the construction of the foregoing legislation that the decision of the present question depends.

III.

RULES OF CONSTRUCTION.

Before commenting upon the language of said statutes, let us note the settled rules of construction as laid down by this Court and applicable to the matter in hand.

So far as relates to the question of jurisdiction on appeal,

all of these acts are *in pari materia*—they all relate to the question of appeal from the Supreme Court of the Territory. The two Acts under consideration are also of different dates, the Circuit Court of Appeals Act being the prior act.

Regarding the rules of construction for such statutes, this Court has said that they are so well understood as to need no citation of authorities.

"They are: First: that effect shall be given to all the words of a statute, where this is possible without a conflict; and, Second: that, as regards statutes *in pari materia* of different dates, the last shall repeal the first only when there are express terms of repeal, or where the implication of repeal is a necessary one. When repeal by implication is relied on it must be impossible for both provisions under consideration to stand, because one necessarily destroys the other. *If both can stand by any reasonable construction, that construction must be adopted.*"

Wilmot *vs.* Mudge, 13 Otto, 261.

In *Rosencrans vs. United States*, 165 U. S., 262, a similar question of construction came up as between the original Act admitting Montana into the Union which provided that the State should constitute one judicial district, and a subsequent Act which divided the district into two divisions. The latter Act contained a provision

"That this act shall not affect the jurisdiction, power, and authority of the court as to actions, prosecutions, and proceedings already begun and pending in said district, but the same will proceed as though this act had not been passed, except that the court shall have power, which it may exercise at discretion, to transfer to the court in said division such of said pending actions, prosecutions, and proceedings as might properly be begun therein under the provisions of this act."

The Court conceded that the provisions carry some implication of a distribution of territorial jurisdiction, and said that the question as to whether or not it can be adjudged

that Congress has created such distribution when it has not in terms directed it, simply because some expressions in the statute imply its existence, is a difficult one.

"Yet," the Court proceeded, "we think the true rule of construction is this:

"When there are statutes clearly defining the jurisdiction of the courts the force and effect of such provisions should not be disturbed by a mere implication flowing from subsequent legislation. In other words, *where Congress has expressly legislated in respect to a given matter that express legislation must control, in the absence of subsequent legislation equally express*, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation. Especially is this rule to control when it appears that Congress in some cases has made express provision for effecting a change. This does not conflict with the doctrine stated *in re Bonner*, 151 U. S., 242, 256, that the jurisdiction of a Court in criminal cases cannot 'be enlarged by any mere inferences from the law or doubtful construction of its terms.' It is rather the converse of that, for the effort is to destroy a jurisdiction otherwise clearly existing, by mere inferences and doubtful construction.

"*This may be a case of mere omission, but it is an omission which the Courts cannot supply.* We cannot assume that because Congress in creating some divisions distributed jurisdiction it meant, in creating other divisions, to also so distribute it, and when we find that in some cases of division it distributed the jurisdiction, and in other cases not, we are not justified in assuming that in this case it intended a distribution which it did not in terms make simply because of the use of the language which somewhat implies that a distribution had already been made."

So also in *Chew Heong vs. United States*, 112 U. S., 536, the Court, in affirming the rule that repeals by implication are not favored, quotes with approval the following language of Justice Story in *Wood vs. United States*, 16 Peters, 362.

"That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the

narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for *it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it*, for they may be merely affirmative or cumulative *or auxiliary*. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and *even then*, the old law is repealed by implication, *only pro tanto*, to the extent of the repugnancy."

The Court also quotes with approval the language of the Court in State *vs.* Stoll, 17 Wall., 430, as follows:

"It must appear that the later provision is certainly and clearly in hostility to the former. *If, by any reasonable construction, the two statutes can stand together, they must so stand.* If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be."

Applying these rules of construction to the statutes in question, what is there in the Act of April 30, 1900, that makes it impossible, so far as relates to an admiralty case, for both provisions under consideration to stand? Is there not a reasonable construction under which, so far as relates to admiralty cases, the right of appeal from the Supreme Court of the Territory is preserved? If there be, in the language of *Wilmot vs. Mudge*, "*that construction must be adopted.*"

Applying the language in *Rosencrans vs. United States*, we have before us in section 15 of the Court of Appeals Act, a statute "clearly defining the jurisdiction of the court" wherein "Congress has expressly legislated in respect to (the) matter," and unless we find the Act of 1900 "equally express" the former "must control."

IV.

THERE IS NO PROVISION IN THE ACT OF 1900 TAKING AWAY THE RIGHT OF APPEAL IN ADMIRALTY CASES CONFERRED BY THE EXPRESS PROVISION OF THE COURT OF APPEALS ACT.

1. The language of section 10 of the Act, above quoted, does not take it away.

That section does not mention admiralty causes, either expressly or by necessary implication. As we have already seen, admiralty cases are a distinct and well-recognized class of cases, and while section 10 enumerates criminal and penal proceedings, actions at law, and suits in equity, it does not mention admiralty causes. Unless, therefore, such causes be included in the language "other proceedings then pending in the courts of the Republic of Hawaii," the section contains no provision relating to them.

But conceding that they are included within the language "other proceedings then pending," etc., the Act provides simply that such causes "shall be carried on to final judg-"ment and execution in the corresponding courts of the Ter-"ritory of Hawaii." This language does not, either expressly or by implication, take away the right to appeal from such courts, for under the Circuit Court of Appeals Act, and in fact, under the settled policy of the law throughout the land, the right of appeal generally is confined to the final judgments of the courts, and that, too, from the courts having the power to carry their final judgments on to execution. As a rule the appellate courts do not carry the judgment to execution. The proposition is patent, and appears upon the face of the statutes.

For instance, sections 691 and 693 of the Revised Statutes provide for a review of any "final judgment" of the circuit court and section 633 of the "final judgments of a district

court;" section 702 provides for appeal from the "final judgments" of the supreme courts of the Territories and section 705 from the "final judgment" of the supreme court of the District of Columbia; while section 701 provides that the Supreme Court shall *not issue execution* in a cause removed before it from a circuit court, or district court acting as a circuit court, or of a district court in prize causes, but shall send a special mandate to the inferior court "to award execution thereupon" and section 916 provides for execution to be issued by said courts.

In *McLish vs. Roff*, 141 U. S., 661, it was held that the omission of the word "final" in the fifth section of the Court of Appeals Act did not permit an appeal except from a final judgment, and that any other construction would render the Act inconsistent with the long-established object and policy of the Acts of Congress in relation to appeals and writs of error.

Thus a construction is placed by Congress upon the language used in section 10 that leaves no room for the construction that by it a right of appeal is cut off.

2. Nor does section 86 contain any such provision. This section provides that the laws of the United States "as be-"tween the courts of the United States and the courts of the "several states shall govern" in the matter of appeals from the supreme court of the Territory.

To ascertain the meaning of this language, it is necessary to refer to those laws. The Act of 1900 is in this respect incomplete, and incorporates within itself that section of the Revised Statutes relating to appeals, etc., from state courts to the federal courts.

So far as this language of the Act of 1900 is concerned, it does not expressly nor by necessary implication include admiralty cases. On the contrary the necessary implication is that so far as relates to the matter there treated of, admiralty cases are excluded, because the method of appeal

is to be governed by the laws relating to appeals from state courts, and state courts have no jurisdiction in admiralty cases.

This suggestion is strengthened when we come to consider the statute referred to, as containing the governing law in such cases, viz: section 709 of the Revised Statutes.

That section provides for a writ of error in three well defined cases, viz: 1. In a case where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, etc.; 2. Where is drawn in question the validity of a statute of, or an authority exercised under any State, upon the ground of their being repugnant to the Constitution, etc.; 3. Where any right, title, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, etc.

Admiralty cases are neither expressly, nor by implication referred to in those laws. As already suggested, they do not provide for a method of appeal in admiralty causes, and are in their very nature incapable of adaptation to them. *Neither do they prohibit* appeals in such cases. They simply leave them untouched. They cannot, therefore, be said to be intended to "govern" appeals in such cases in any Court.

It is clear from the foregoing, that the method of appeal referred to in section 86 was intended to apply to the ordinary jurisdiction of the Territorial court after the federal court (the creation and jurisdiction of which is the special subject-matter of section 86) should have been established. To this view the incorporation of the provision under consideration in section 86 necessarily lends itself. The ordinary jurisdiction of the Territorial court, such as it would be *after* the federal court is established, is coextensive with the jurisdiction of the State courts, and hence at such time no other or different method of appeal than that there provided would be necessary.

But before the organization of the federal court this Territorial court had a different jurisdiction; one that included cases which were after the organization of the federal court transferred to the latter, *with the right of appeal in such cases to the Circuit Court of Appeals of the Ninth Circuit.* For that jurisdiction the system of appeal from the supreme court of the Territory provided for in section 86 is inadequate, and unless our construction be the true construction of the statute, the right of appeal in such cases fails when the action is in the one court and succeeds when in the other.

There is then no necessary repugnance between section 86 of the Act of 1900 and section 15 of the Circuit Court of Appeals Act, with reference to appeals in admiralty cases. On the contrary section 86 bears internal evidence of intention to permit a review in that class of cases. As to such causes both statutes may stand and be operative, and in view of the foregoing considerations we consider this construction reasonable, and, under the authorities above cited, necessary.

We think, also, that this construction has the direct sanction of this Court in a similar case.

In *Shute vs. Keyser*, 149 U. S., 649, the question of the right of appeal to the United States Supreme Court from the supreme court of a Territory was brought in question by reason of the provision in the Court of Appeals Act that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed."

The contention was that section 702 of the Revised Statutes providing for appeals from the supreme courts of the Territories to the Supreme Court of the United States was inconsistent with the provisions of the Circuit Court of

Appeals Act, and therefore repealed by virtue of the foregoing clause.

We can readily see that this would be true with respect to such cases as were by section 6 of the Act made final in the Circuit Court of Appeals, for appeal in such cases is provided for in section 15. But the case there under consideration was not one made final in the Circuit Court of Appeals, and this Court held as follows:

"There was no provision for appeals or writs of error in cases not made final by section six from the supreme courts of the territories to the circuit courts of appeals, and there was no express repeal of the provisions of the prior acts regulating appeals or writs of error in such other cases from those courts to this. There is nothing to indicate an intention that the judgments and decrees of the supreme courts of the territories should not be susceptible of review in the class of cases in which there was no appeal or writ of error to the circuit courts of appeals.

"The result is that, as the acts regulating appeals or writs of error from or to the supreme courts of the territories to or from this court were not repealed, except to the extent specified, an appeal or writ of error lies to this court from the judgments or decrees of those courts, except in cases where the judgments of the circuit courts of appeals are made final."

We think the analogy between the facts of this case and those in *Shute vs. Keyser* perfect and conclusive.

That case was subsequently affirmed in *Folsom vs. United States*, 160 U. S., 121.

V.

THE REASON AND INTENT OF THE LEGISLATION.

If our contention that there is no repugnance, so far as relates to admiralty causes between the Hawaiian Act of 1900 and section 15 of the Circuit Court of Appeals Act be correct, then the latter is not "locally inapplicable". But

it was argued in the lower court and the suggestion adopted by that court, that it was the intent of the Legislature to organize the Territorial courts upon the lines of the State courts, to the end that all cases of a local nature could be tried and determined finally in the Islands.

We may, for the purposes of argument, concede this, yet our position is not thereby weakened, but rather strengthened. The analogy between the Territorial courts and the State courts cannot affect the question of appeals in admiralty causes, for, as we have already seen, the State courts have no such jurisdiction. We have the further fact that admiralty causes are not local in their nature, but international in their character, and it is for this reason and no other, that Congress has seen fit to take them out of the jurisdiction of State courts, and placed them in the exclusive jurisdiction of the federal courts. Now, the provisions of the Hawaiian Act of 1900 indicate no exception to this policy, for, by section 86, the very same division of jurisdiction is provided for. The jurisdiction of the Territorial court in the present case arose from the fact that the Territory became American before the federal court was organized, and being American territory, there is no reason why a policy should attach before the organization of a federal court different from that which the statute marks out after the organization of that court. The court does not create the policy; it is merely an instrument in carrying it out, and mere change in the instrument does not change the policy. Both courts were provided with the necessary machinery to carry it out.

The foregoing considerations, and particularly the transfer of the jurisdiction in such cases to the federal courts, where the right of appeal is expressly reserved, indicate that it was the intention of Congress that admiralty causes should remain, with respect to the right of appeal, where the law found them when the Hawaiian Act of 1900 was passed,—

an exception to the rule provided in that Act for appeals from the Territorial court.

Indeed, in this very litigation we have before this Court the anomaly of two suits arising out of the same collision, the present one (that on behalf of the lost ship) brought in the Territorial courts, and the other (that on behalf of her cargo) brought in the federal court of the Territory. In the latter no one doubts the right of appeal. As both causes arose out of the same transaction and at the same time, any policy that would deprive us of this appeal would likewise prohibit an appeal in its sister case from the federal court.

We respectfully submit that there is nothing in the policy of the law or the terms of the act that takes away the right of appeal conferred by section 15 of the Act of 1891, establishing the Circuit Court of Appeals.

VI.

The assignment of the Territory of Hawaii to the Judicial Circuit under the Act of March 3, 1891.

The petition contains a prayer that the Territory of Hawaii be assigned to the Ninth Judicial Circuit under section 15 of the act of March 3, 1891. The petitioner does not wish to be understood as presuming to suggest to the Court in what manner the discretion of the Court shall be exercised in making such assignment or to designate the particular circuit to which, if it please the Court to make such assignment at all, the Territory of Hawaii shall be attached. But the petitioner has assumed, perhaps not improperly, that for geographical reasons and because the Act of 1900 provides for appeals in admiralty causes from the district court established by that act to the Circuit Court of Appeals for the Ninth Circuit, the Territory will, if assigned, be attached to that circuit. And so, in the effort to protect its rights, the petitioner has attempted to take its appeal to that court.

If it shall please the Court to make such assignment it will evidently be proper that such order be so made as to relate back to the date when the act organizing the Territory of Hawaii became effective. Until the decision of this Court upon the present petition, it cannot be known that such assignment is a proper one to be made at any time. But if this Court shall hold it to be proper, for the protection of parties litigant, to make such assignment, either generally or to cover the special and peculiar circumstances growing out of the transfer of jurisdiction, the fact that the assignment was not sooner made ought not to operate to the prejudice of the petitioner, the delay not having arisen from his act.

An example of a *nunc pro tunc* order under somewhat analogous circumstances is found in

Ex parte Railroad Company, 95 U. S., 221.

The appellee could not complain of such an order, for it has been held by many decisions of this court that where a right is conferred by statute, to be made certain by the action of a public officer, the right does not depend on the action of such officer but on the act of Congress itself.

VII.

MANDAMUS THE PROPER REMEDY.

"The writ of mandamus lies, as held in *Ex parte* Parker, 120 U. S., 737, where an inferior court refuses to take jurisdiction when by law it ought to do so."

Ex parte Parker, 131 U. S., 221.

Ex parte Jordan, 94 U. S., 248.

VIII.

THE PRAYER FOR A STAY OF PROCEEDINGS.

The petition shows that by the refusal of the Circuit Court of Appeals to take jurisdiction great injury to the petitioner is imminent. Until such refusal execution was stayed by virtue of the stipulation between the parties and the bond executed thereunder. The termination of the proceedings before the Circuit Court of Appeals leaves the petitioner without protection, even during the consideration of the matter by this Court. It is well settled that this Court, where the circumstances require it, will issue a stay of proceedings, "under the general power conferred upon this Court by the fourteenth section of the Act of the 24th of September, 1789." This will be done even when "leaving the question, whether a writ of error will lie to the judgment in this case, an open one."

Hardeman *vs.* Anderson, 4 How., 642.

"Upon the facts stated in the application, there is no doubt that the writ of error, bond, and citation, having been given in due season according to law, operated as a stay of execution, and that a *supersedeas* to the *fieri facias* ought to issue from this court, to supersede and quash the same, as prayed for in the motion. Indeed, the issuing of the execution was wholly irregular, and it might have been quashed by an application to the court below. But it is equally competent for this court to do the same thing in furtherance of the purposes of justice."

Stockton *et al. vs.* Bishop, 2 How., 75.

It is respectfully submitted that mandamus should issue as prayed.

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